



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.412 OF 2012

IN THE MATTER OF THE ESTATE OF JOHANA KEYA KIKUYU – (DECEASED)

AND

**IN THE MATTER OF AN APPLICATION BY BEN NYANGA ADUOL
–EXECUTOR/APPLICANT**

AND

**IN THE MATTER OF TITO BARATI AND 11 OTHERS
RESPONDENTS**

R U L I N G

The Application

1. The application for determination is the Chamber Summons dated 16th March 2015 brought pursuant to Sections 1A, 1b, 3, 3a AND 18 of the Civil procedure Act. The applicant seeks the following ORDERS:-
 1. THAT the District Land Registrar Kakamega in the company of the District land Surveyor, Kakamega to visit the land afresh, identify the beacons for parcel No.KAKAMEGA/MUDETE/1468 as marked on the ground by the deceased and apportion the same to the applicant.
 2. THAT the District Land Registrar Kakamega and the District Land Surveyor Kakamega to visit the ground and identify the boundaries as marked on the ground by the deceased JOHN KIKUYU KEYA regarding portions of KAKAMEGA/MUDETE/1467 to PHINIAS ILATSIA KEYA, MICAH SCOTT, DANIEL NDULA, TITO BARAT and write a report on their respective occupation.
 3. THAT the District Land Registrar and District Surveyor Kakamega in conducting the exercise to ignore the position of the current residence of PHINIAS ILATSIA KEYA.
 4. The costs of this application be provided for.

The application is supported by the affidavit of SAMWEL JAMHURI KEYA and based on the grounds set out on the face of the application itself.

2. In his affidavit the deponent claims there was open bias by the District Surveyor Vihiga and Land Registrar Vihiga who visited land parcel No.Kakamega/Mudete/1468 and made a report. He now wants a fresh survey exercise to be conducted by the District Land Registrar Kakamega accompanied by the Surveyor from Kakamega.
3. The application is opposed although the replying affidavit is not on record but the same has been

- mentioned in the written submissions filed by the parties.
4. The application herein was canvassed by way of written submissions. The Court has carefully read through the rival submissions.

Determination

5. It is not in dispute that on the 31st of March 2014, this Court (though differently constituted) ordered the Vihiga Land Registrar and Surveyor to visit plot number Mudete/559 and identify the portions of each beneficiary as it exists on the ground. The report was to include the acreage of each occupant. The Objectors were to meet the costs.
6. Pursuant to the said order, the Land Registrar and Surveyor visited the scene and filed a report on 21st October 2014. From the report, it is noted that the three brothers, namely Phinias Keya, Samwel Keya and Tito Barat do not agree on the extent of the portions each holds on the ground. It is further noted that Tito and Phinias do not agree on the boundary allegedly marked by the deceased. Further, it is noted that Samwel and Phinias do not agree as to who between them should own the portion of land on which both have their semi-permanent houses. The report also says that the graves of the deceased and the deceased's wife do not exist on the disputed portion.
7. After carefully considering the application as filed, the response thereto, the submissions and the history of this case, I have reached the conclusion that ordering another visit by the Land Registrar and the Surveyor, even if they are from Kakamega will not resolve the issues that are at the centre of this dispute. And in my humble view, that is precisely the reason why the parties are in Court. Infact I find that the instant application is an abuse of the Court process.
8. For the reason that the main cause is still before this Court for determination and in view of the recommendation by the Vihiga County Surveyor, this Court will visit the site in the presence of both the District Land Registrar and the District Land Surveyor on a date to be agreed upon by all the parties before the case proceeds to further hearing. The application dated 16th March 2015 is therefore dismissed for two reasons. That is an abuse of the process of the Court and is also for reasons that the provisions of the rules under which the application is brought are not imported into the law of Succession Act, Cap 160 of the Laws of Kenya.
9. Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 14th day of June 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Nandwa for Nyanga For Applicants

M/s Musiega & Co. – absent For Respondent

Mr. Okoit - Court Assistant